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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 State of Arizona, *ex rel.* Kristin K.  
Mayes, Attorney General; *et al.*,

9 Plaintiffs,

10 v.

11 Michael D. Lansky, L.L.C., dba Avid  
Telecom; *et al.*,

12 Defendants.  
13

No. CIV 23-233-TUC-CKJ

**ORDER**

14 Pending before the Court is the Motion for Leave to File Further Supplemental  
15 Motion to Dismiss ("Motion to Supplement") (Doc. 150) filed by Defendants Michael D.  
16 Lansky, *et al* ("Defendants" or "Avid"). Plaintiffs State of Arizona, *ex rel.* Kristin K.  
17 Mayes, *et al.* ("Plaintiffs" or "AGs") have filed a response (Doc. 160) and Avid has filed a  
18 reply (Doc. 164).

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20 *Applicable Procedural History*

21 In its original Motion to Dismiss, Avid sought dismissal of the claim of personal  
22 liability against Michael D. Lansky ("Lansky") based on a common law piercing of the  
23 corporate veil and on the alleged inadequacy of Plaintiffs' claims arising under the  
24 Telecommunications Consumer Protection Act ("TCPA") (Doc. 39).

25 Avid sought to supplement its Motion to Dismiss, citing new case law which had  
26 determined no personal liability existed even where a defendant personally participated in  
27 or directed a TCPA violation (Doc. 62). The Court denied the request, finding the case law  
28 was not binding precedent and was not issued before the filing of the original Motion (or

1 relied on those prior decisions). May 8, 2024, Order (Doc. 64).

2 On September 12, 2025, Avid filed the pending Motion to Supplement. Avid asserts  
3 new Supreme Court authority warrants supplementing his Motion to Dismiss. *See e.g.*  
4 *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024); *McLaughlin Chiropractic*  
5 *Assocs., Inc. v. McKesson Corp.*, 606 U.S. 146, 168 (2025). Avid's Motion to Supplement  
6 also argues that, as interpreted by the Ninth Circuit, Fed.R.Civ.P. 12(g) allows consideration  
7 of the issues. *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 319 (9th Cir. 2017),  
8 *aff'd sub nom. Apple Inc. v. Pepper*, 587 U.S. 273 (2019). Finding "practical wisdom" in  
9 authority from the Third Circuit, the Tenth Circuit, and district court cases, as well as 2–12  
10 Moore's Federal Practice—Civil § 12.23 ("[B]ecause [a 12(b)(6) defense] is so basic and  
11 was not waived, [a district] court might properly entertain a second motion if it were  
12 convinced it was not interposed for delay and that addressing it would expedite disposition  
13 of the case on the merits."), the Ninth Circuit determined "practical wisdom" leads to be  
14 "forgiving of a district court's ruling on the merits of a late-filed Rule 12(b)(6) motion."

15 Avid also argues Fed.R.Civ.P. "15(d) gives district courts broad discretion to allow  
16 supplemental pleadings, including after a motion to dismiss[.]" Reply (Doc. 164, p. 2.).  
17 They further assert reconsideration is appropriate because there is an intervening change in  
18 law.

19 Plaintiffs assert, however, a Motion to Supplement is an inappropriate vehicle to  
20 request consideration of intervening law and, therefore, Avid's request should be denied.  
21 Even if the Court considers the request as a motion for reconsideration, Plaintiffs assert the  
22 request should be denied because Avid did not include the argument in their original Motion  
23 to Dismiss and is untimely.

24 The Court disagrees with Avid that Fed.R.Civ.P. 15(d) affords the Court broad  
25 discretion to allow Avid to amend its motion to dismiss. By its terms, Fed.R.Civ.P. 15(d),  
26 only applies to pleadings. Fed.R.Civ.P. 7 makes clear there is a distinction between  
27 pleadings and motions. *See also* Fed.R.Civ.P. 15, Committee Notes on Rules – 2009  
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1 Amendment ("a motion is not a 'pleading' as defined in Rule 7").

2 However, Ninth Circuit authority recognizes the practical wisdom of considering a  
3 late-filed motion to dismiss. Whether entitled a late-filed motion to dismiss, a supplemental  
4 motion to dismiss, or a motion to reconsider, the Court finds it appropriate to consider the  
5 substance of Avid's arguments. *See e.g. Andersen v. United States*, 298 F.3d 804, 807 (9th  
6 Cir. 2002) ("The substance of the motion, not its form, controls its disposition."); *Prudential*  
7 *Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir.2000) ("[T]he  
8 label attached to a motion does not control its substance."); *United States v. Dieter*, 429 U.S.  
9 6, 8-9 (1976) ("It is true that the Government's post-dismissal motion was not captioned a  
10 'petition for rehearing,' but there can be no doubt that in purpose and effect it was precisely  
11 that, asking the District Court to 'reconsider (a) question decided in the case' in order to  
12 effect an 'alteration of the rights adjudicated.'").

13 Asserting a change in controlling law, Avid seeks dismissal of the personal liability  
14 claims based on the application of the TCPA. Avid asserts the deference afforded to the  
15 interpretation of the Federal Communications Commission ("FCC") that personal liability  
16 may be imposed is no longer required under *Loper Bright* and *McLaughlin*. Avid asserts:

17 Indeed, the only basis for the application of personal and vicarious liability has been  
18 the unilateral interpretation of the TCPA by the FCC that personal liability can be  
19 applied. Thus, while the *Chevron* Doctrine was the "law of the land", courts  
generally fell in line and deferred to the FCC's interpretation, finding that personal  
liability can be applied.<sup>3</sup>

20 <sup>3</sup>FCC's interpretation of TCPA stating that "The agency has clarified that the  
21 sender subject to liability under the statute is the person "on whose behalf [the  
22 faxes] are transmitted,". *See In re Rules and Regulations Implementing the*  
23 *Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12407  
24 (1995) [hereinafter 1995 Order]. *City Select Auto Sales Inc. v. David Randall*  
25 *Assocs., Inc.*, 885 F.3d 154, 159 (3d Cir. 2018) & also relied in *Palm Beach*  
26 *Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir.  
2015). Even the Supreme Court, when determining whether vicarious  
Liability applies under the TCPA, has deferred to the FCC's interpretation of  
the statute. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 168, 136 S.  
Ct. 663, 193 L. Ed. 2d 571 (2016) (citing *In re Joint Petition Filed by DISH*  
Network, LLC, 28 FCC Rcd. 6574 (F.C.C. 2013)).

27 Motion to Supplement Motion to Dismiss (Doc. 150, p. 4).

28 The issuance of *McLaughlin*, which made clear *Loper Bright* applied to the TCPA,

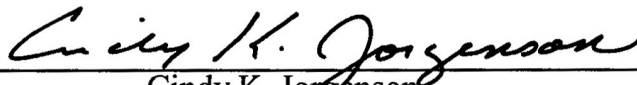
1 constitutes "new . . . legal authority that could not have been brought to [the Court's]  
2 attention earlier with reasonable diligence." LRCiv 7.2(g). Further, because those opinions  
3 were issued more than 14 days after the Court's May 8, 2024, Order, good cause exists to  
4 accept the document if it is treated as a Motion for Reconsideration.

5 The Court finds it appropriate to grant Avid's Motion to Supplement (Doc. 150) and  
6 treat Avid's lodged Supplement to Defendants' Motion to Dismiss (Doc. 151) as a Motion  
7 for Reconsideration. The Court will schedule a response and reply time for the Motion for  
8 Reconsideration. *See* LRCiv 72.2(g)(2) (motion for reconsideration may not be granted  
9 without providing opposing party an opportunity to respond).

10 Accordingly, IT IS ORDERED:

- 11 1. Avid's Motion to Supplement (Doc. 150) is GRANTED.
- 12 2. Avid shall docket its lodged Supplement to Defendants' Motion to Dismiss  
13 (Doc. 151) as a Motion for Reconsideration on or before November 25, 2025.
- 14 3. Plaintiffs shall file any response on or before December 19, 2025; Avid shall  
15 file any reply on or before January 5, 2026.

16 DATED this 19th day of November, 2025.

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19 Cindy K. Jorgenson  
20 United States District Judge  
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